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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Winstar Communications, LLC	)	
Emergency Petition for Declaratory Ruling	)	WC Docket No. 02-80
Regarding ILEC Obligations to	)	
Continue Providing Services	)	

REPLY OF
WINSTAR COMMUNICATIONS, LLC

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REPLY OF
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Winstar Communications, LLC, ("IDT Winstar") responds to the Comments filed regarding IDT Winstar's Emergency Petition for Declaratory Ruling ("Petition").[1] Verizon Communications, Inc. ("Verizon"), Qwest Communications ("Qwest") and SBC Communications, Inc. ("SBC") (collectively, the "RBOC Commenters") uniformly attempt to divert attention away from their obligations under the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Communications Act"); these are duties that they would apparently prefer not to discuss. Instead, they contrive a spurious argument that the bankruptcy law somehow obviates their Communications Act obligations, and then seek enforcement of that position by the Federal Communications Commission. The Commission should expeditiously return this proceeding to the issue appropriately before it.

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1 The FCC placed the Petition on Public Notice on April 19, 2002. See Wireline Competition Bureau Seeks Comment on Winstar Communications, LLC's Emergency Petition for Declaratory Ruling Requesting the Commission to Require the ILECs to Provide a Seamless Transition of Service to Customers, WC Docket No. 02-80, *Public Notice*, DA 02-924 (rel. April 19, 2002).

The RBOC Commenters appear to agree unanimously with IDT Winstar that this proceeding raises a question of substantial public policy. However, the fundamental question before the Commission is whether, under the Communications Act, incumbent local exchange carriers ("ILECs") are permitted to withhold service from a new customer, and therefore to hold hostage the end users the customer seeks to serve, in order to force that new customer to pay off the debts of another customer. The policy implications that emanate from this question are equally clear: whether the Commission will tolerate the ILECs' misuse of their tariffs and "internal procedures" to waste the assets of their competitors, and whether the Commission will tolerate the interruption and disconnection of end users and the chilling effect on future efforts to avoid such effects through investments in the assets of carriers in bankruptcy. The Commission should expeditiously issue an Order with a resounding no to these questions.

I. INTRODUCTION AND SUMMARY.

Having issued the threat of cutting off IDT Winstar and its thousands of customers in a variety of forums, including various state regulatory commissions, the bankruptcy court, the federal district courts and even this agency, the RBOC Commenters now assert that the problem is one of IDT Winstar's own making. The RBOC Commenters try to portray IDT Winstar as flouting its regulatory obligations and creating unnecessary delays. On the contrary, the record reflects unequivocally that IDT Winstar proceeded diligently to pursue all necessary regulatory approvals, gain all necessary clearances, comply with all regulatory requirements including customer migration rules, negotiate and execute all necessary interconnection agreements, and request provisioning of circuits and other facilities pursuant to those agreements. All of this in fact has been done in an extraordinarily condensed amount of time. In order to ensure that the record is factually correct, IDT Winstar provides as Exhibit A hereto the Declaration of Jean L.

Kiddoo, counsel to IDT Winstar in its regulatory efforts. The Declaration provides an overview of IDT Winstar's numerous steps to comply with all of its regulatory obligations, along with the RBOC Commenters' efforts to thwart those steps.

As described in the Petition, IDT Winstar's parent company offered to purchase certain assets, including customers, of Winstar Wireless, Inc. and certain of its affiliates ("Old Winstar"), and on December 19, 2001, the Bankruptcy Court entered a Sale Order accepting that offer.[2] At that time, Old Winstar was on the verge of converting its Chapter 11 bankruptcy proceeding to a Chapter 7 liquidation proceeding, and its customers were threatened by a precipitous termination of their service. On the same day that the Sale Order was issued by the Bankruptcy Court, IDT Winstar and Old Winstar initiated the processes to obtain the numerous federal and state regulatory approvals required to transfer Old Winstar's assets and customers and to enable IDT Winstar to operate as a telecommunications carrier. Three weeks after the Sale Order was issued, IDT Winstar and Old Winstar filed with the FCC four separate applications involving over 1700 licenses. In 42 states, the parties filed applications for asset transfer approval. Additionally, depending on particular state requirements, the parties applied for transfer of local and intrastate long distance certificates or for a new certificate for IDT Winstar; notices of the transaction and transfer of service were filed in the remaining states. In addition, the parties issued notices to customers and to the FCC at least 30 days in advance of the proposed transfer date pursuant to the Commission's customer migration rules (*i.e.* "slamming" notices). All of these efforts were undertaken promptly and, with only minor exceptions, the most significant of which was created by the interference of Verizon in a proceeding before the

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2 Petition at 3.

Florida Public Service Commission, was completed within the 120-day window required by the Sale Order.

To claim, as the RBOC Commenters do, that IDT Winstar "purposely fail[ed] to notify customers" and that the threat of discontinuance "is one of [IDT Winstar's] own making"[3] is simply absurd and has no basis in fact. To the contrary, IDT Winstar worked diligently to obtain nationwide regulatory approvals to acquire regulated assets and to offer telecommunications service, to request service from the ILECs, and to transition Old Winstar's customer base and to condense that process, which typically takes six months or more, into a 120-day period . To the extent end users currently face the threat of discontinuance of service, it is solely the result of the RBOC Commenters' interference with the various regulatory processes and their exercise of control over bottleneck facilities, and they should not now be permitted to claim relief from a problem that they created.[4]

II. THE ERRONEOUS BANKRUPTCY LAW ARGUMENTS ARE NOT PROPERLY BEFORE THE FCC.

Verizon, Qwest and SBC all argue that the FCC cannot enforce the Communications Act because to do so would circumvent the bankruptcy laws. They contend that once a debtor or its successor assumes and assigns a contract, bankruptcy law requires that it must cure any defaults. The FCC need not address that argument for two reasons. First, the bankruptcy court has

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3 Comments of Qwest Corporation in Response to the Emergency Petition for Declaratory Ruling of Winstar Communications, LLC at 2-3 (filed April 29, 2002)("Qwest Comments").

4 Amazingly, the RBOCs concede that IDT Winstar "could have" requested its own service arrangement . . . well in advance – it had 120 days to do so in this case . . ." and that, had it done so, the RBOC "would have been able to migrate customers to the new facilities ordered" by IDT Winstar. Verizon Comments at 24-25. Yet they blithely ignore all that IDT Winstar did undertake during that short period to obtain not only extensive regulatory approvals, but also to obtain interconnection agreements and to request its own service arrangements from the RBOC Commenters in ample time for them to have undertaken precisely what they now tell the Commission that they would have done had IDT Winstar done exactly what it in fact did do.

retained exclusive jurisdiction to interpret and enforce its own Sale Order, including the provisions of that order regarding rejection, assumption and cure.[5] Second, the underlying premise of this argument -- that IDT Winstar has assumed Old Winstar's contracts -- is simply wrong. The FCC therefore should not grant the RBOC Commenters' request for a declaration that IDT Winstar made some sort of "*de facto*" assumption and therefore must pay them a "cure" to exercise its rights under the Communications Act.

The RBOC Commenters are fully aware that IDT Winstar has instructed Old Winstar to reject the prior agreements with them.[6] The Sale Order unambiguously provides that IDT Winstar is not a party to any rejected contracts and has no liability for any past defaults under those contracts. The bankruptcy court, not this regulatory agency, should decide whether IDT Winstar's efforts to enforce its Communications Act rights somehow modify those clear provisions of that court's order, and this Commission should instead focus on the issue before it – whether the denial and delay of service by the RBOC Commenters to IDT Winstar violates the Communications Act.

In any event, the bankruptcy argument posited by the RBOC Commenters are wrong. The Delaware bankruptcy court rejected a similar argument in *In re Net2000 Communications, Inc., et al., Debtors,* Case No. 01-11324 (MFW) (Bankr.D.Del. Feb.13, 2002).[7] Verizon Communications there contended that, because the purchaser of the services and facilities provided to the debtor under certain so-called "Verizon Contracts" was using those services and

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5 *See* Sale Order at ¶ 15 (a copy of which was appended to the Petition as Exhibit 3).

6 Comments and Counter-Petition of Verizon at 7 (filed April 29, 2002)("Verizon Comments"); Comments of SBC Communications, Inc. at 8 (filed April 29, 2002)("SBC Comments"); Qwest Comments at 7. Verizon's Counter-Petition is the subject Public Notice released today.

7 A copy of this Order is attached hereto as Exhibit B.

facilities, it therefore had assumed those contracts and was liable to cure the debtor's arrearages under those contracts pursuant to Bankruptcy Code § 365(b)(1)(A). The bankruptcy court held that the buyer had *not* assumed the contracts and was *not* obligated to cure the defaults thereunder.[8] In *Personal Computer Network*, Illinois Bell had threatened to terminate the use of specific telephone numbers by a third party purchaser of the assets of the debtors unless the buyer paid it the pre-sale amounts due from the debtors. The bankruptcy court ruled that Illinois Bell could not force the purchasing plaintiffs to pay the debtor's pre-petition debt or else have service terminated:

> Bell's attempt to hold the transfer of these numbers hostage while looking to its tariff for authority for payment of pre-petition debt is unfounded in law and inequitable in result.

In effect Bell would have this court sanction blackmail at its worse [sic] or priority over other creditors at its best by allowing Bell to recover a pre-petition unsecured claim in this manner. The very purpose of the bankruptcy laws is to suspend the *status quo* of the rights and obligations between the debtor and its creditors.[9]

IDT Winstar believes that the Delaware court would reject the RBOC Commenters' attempts to use similar blackmail here, but, in any event, that matter is for the Delaware bankruptcy court. Nothing in FCC precedent requires the FCC to interpret and make findings with respect to bankruptcy laws. The FCC is obliged to interpret the Communications Act in ways that minimize conflicts with other federal statutes,[10] but it is plainly not obligated -- indeed

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8 See also In re Personal Computer Network, Inc., 85 B.R. 507 (Bankr. N.D. Ill.), appeal den'd., 89 B.R. 19 (N.D. Ill. 1988).

9 Id. at 509.

10 In LaRose v. FCC, 494 F.2d 1145 (D.C.Cir. 1974), the court did not address at all the FCC's ability to interpret the Bankruptcy Code. Rather, the court noted that the FCC along with other administrative "agencies should constantly be alert to determine whether their policies might conflict with other federal

Congress has not delegated to it the responsibility -- to render interpretations and findings under those other statutes.

Significantly, the *Winstar* bankruptcy court explicitly declined to rule on matters arising under the Communications Act. In its April 19, 2002 Order, appended to Qwest's comments, the bankruptcy court states:

> Nothing in this order shall constitute a ruling on the rights or obligations (if any) of any party ... under any regulatory statute.[11]

And, at the April 15 hearing so fully described and emphasized by Verizon,[12] the bankruptcy court in fact expressly acknowledged that there may be additional obligations triggered by the Communications Act even after rejection of ILEC contracts:

> First, I want to say that *anything this Court does cannot and should not and will not affect the federal Telecommunications Act. The parties still have whatever rights or obligations they have under that act.* * * * If a contract or lease is not assumed, it is deemed rejected. The other party, the third party to any rejection or deemed rejected lease or contract can terminate its service and/or take possession of its property *subject, again, to any restrictions in the Telecommunications Act.*[13]

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policies and whether such conflict can be minimized." Id. at 1147 n.2. Oddly, while claiming the Bankruptcy Code prohibits IDT Winstar from demanding its rights as customer/CLEC under Section 201, 202, 203 and 251 of the Communications Act, the RBOCs also insist there is no conflict. *See* Verizon Comments at 16; SBC Comments at 14.

11 In re Winstar Communications, Inc., No. 01-1430 (Bank. D. Del.)(JCA), Order on Trustee's Motion for an Extension of Time to Assume or Reject Executory Contracts and Leases, and Order Denying Motion of Winstar Holdings, LLC to Enforce Injunction Against Stopping Services to Debtors Before the Cutoff Date (Apr. 19, 2002).

12 Verizon Comments at 10. While Verizon quotes and then mischaracterizes the transcript of that hearing, it omits the full statements issued by the Court quoted above. Contrary to Verizon's portrayal, IDT Winstar did not ask the Court to rule on matters of telecommunications policy, nor did the Court "reject[ ]" this mythical request. Rather, the Court denied the Trustee's request, supported by both IDT Winstar and the United States Government, to extend the time for assuming and rejecting executory contracts, a time period set by a prior order of the Bankruptcy Court issued under the Bankruptcy Code.

13 In re Winstar Communications, Inc., No. 01-1430 (Bank. D. Del.)(JCA), April 15, 2002, Hearing Transcript at 66-67 (emphasis supplied).

The FCC is thus free to exercise it proper jurisdiction to rule on the Petition and to enforce the Communications Act.

III. THE RBOC COMMENTERS POSITION VIOLATES THE COMMUNICATIONS ACT.

In the face of IDT Winstar's argument that the threats by RBOC Commenters to disconnect active end user service and to delay provisioning of new service to IDT Winstar violate Sections 201 and 251 of the Communications Act, the RBOC Commenters respond by arguing that their obligations to furnish communications services through just and reasonable practices and to interconnect with the facilities and equipment of other carriers are trumped by provisions in their tariffs[14] and interconnection agreements that restrict assignment of facilities from one carrier to another.[15] IDT Winstar has demonstrated above that the RBOC Commenters' arguments are irrelevant because IDT Winstar has not assumed the contracts of Old Winstar and, as such, the tariffs and interconnection agreements cited by the RBOC Commenters are not implicated. However, even if the Commission considers these assertions, it should find that, if these provisions were to permit the ILECs to refuse to provision service to a new carrier who requires such service to serve its customers and to disrupt services to end users, then they are illegal and unenforceable.

The RBOC Commenters' claim that IDT Winstar could have acquired the customer assets of Old Winstar only under certain limited scenarios. They suggest that IDT Winstar could have (1) assumed the arrangements of Old Winstar and paid all of its past debts; (2) officially notified all of the customers receiving service from Old Winstar of its intention to discontinue

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14 Qwest Comments at 11.

service;[16] or (3) ordered circuits and other facilities under the RBOCs' "procedures" which, eventually, would have supplied them.[17]

Interestingly, the RBOC Commenters have mysteriously changed the third option from the draconian "disconnect/reconnect" scenario that Qwest and Verizon have been postulating to state regulators. They are now indicating to this Commission that it was only IDT Winstar's failure to seek new service arrangements in a timely fashion that precluded a seamless transition of service.[18] The Commission should not be misled by this seemingly more benign posture. As indicated in Exhibit A, IDT Winstar made every effort to secure appropriate agreements and to work with the ILECs to migrate the customers during the months following the Sale Order, and, but for last minute "stop processing" directives at Qwest and Verizon, had no indication that the procedures that it was following were not going to be acceptable to them.

In effect, therefore, what the RBOC Commenters are arguing is precisely the type of heavy-handed scenario they described to the states.[19] What they have done is to delay the processing of IDT Winstar's service requests to create a timing issue, and then claim that there isn't enough time to follow their procedures. Therefore, the argument here is essentially the

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15 Verizon Comments at 24 n.18 (although it should be noted that the language quoted may not prove Verizon's point).

16 See, e.g., SBC Comments at 1-2. This second possibility is patently absurd – why would any carrier acquire and then send discontinuance notices to customers that it has no intention of discontinuing?

17 See, e.g., Verizon Comments at 2, 24-25; Qwest Comments at 14-15.

18 See, e.g., Verizon Comments at 16-17, 24-25; Qwest Comments at 2, 10. Qwest's comments, for example, express concern about being prevented from following its "procedures" without noting that one effect would be customer disruption. Only much later to those comments come close to admitting this.

19 For example, in Florida and Maryland, Verizon threatened that "there will be no service to [IDT] Winstar" while it is conducting its procedures, while in Minnesota, Qwest threatened that if IDT Winstar does not assume Old Winstar's debt, "[f]acilities, circuits, etc. provisioned under the Old Winstar interconnection agreement *will be terminated*." See Petition, at Exhibits 1, 5, 9.

same (though couched in less menacing verbiage) as the draconian threats that Verizon and Qwest have made in the states: either pay us Old Winstar's debt or we will disrupt your customers' services for some undisclosed period of time. No matter how it is accomplished, the result is the same: the RBOC Commenters seek to use their control over monopoly bottleneck facilities to bludgeon a competitor into paying for another company's debt.

Importantly, the RBOC Commenters make virtually no attempt to justify their position in terms of consumer welfare. The interests of telephone subscribers are nowhere to be found, save in Verizon's much abbreviated description of the reciprocal economics of bankruptcy bid prices and cure costs.[20] Any reflection on the consumer welfare aspects of this matter leads to the conclusion that customer disconnection should be impermissible. The fact of the matter is that the RBOC Commenters appear willing to disconnect services to end users even though they will be collecting compensation in advance for the services they are being asked to provide. Yet while IDT Winstar bears an obligation to pay in advance for services it receives, and the RBOC Commenters are therefore assured that they will be made no worse off during a transition period, IDT Winstar and its end user customers would be, absent a court order enjoining them from doing so, under a constant threat of being shut down by the RBOC Commenters and BellSouth on 3-days' notice. The only incentives for an ILEC to act in such a manner would be to obtain

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[20] Verizon Comments at 22. Verizon's discussion focuses both on the bid price effects of requiring a buyer to pay cure in these circumstances and on the way in which this would affect the distribution of estate proceeds among creditors. Verizon's point, apparently, is that a rebalancing of the law to favor ILECs eventually would affect in some unquantifiable way the level of telecommunications prices and investment. This is the only place where consumer interests make any appearance in the RBOCs' Comments. Whether in the broad scheme of things promoting the interests of telecommunications monopolies over commercial banks or general trade creditors is desirable public policy is an interesting question, but hardly one for this proceeding.

compensation illegally or to exercise monopoly power to eliminate competition and harm end users in the process.

As Verizon's comments indicate, "[t]he measure of what is reasonable is in the facts."[21] Here, there is no disagreement about the facts: the circuits and other facilities IDT Winstar seeks to use are in place. Nothing has to be done to permit the Old Winstar customers that wish to receive service from IDT Winstar to have it without disruption. The RBOC Commenters never dispute this basic fact. Indeed, they make it quite clear that if IDT Winstar pays Old Winstar's pre-Sale Order debt, the so-called "problems" of reprovisioning customers to IDT Winstar will disappear. Instead, in direct disregard for the Commission's longstanding policies to minimize customer disruption, the RBOC Commenters are threatening to up-end the transitioning of thousands of customers lawfully acquired by and transferred under the Commission's rules to IDT Winstar solely because the carrier that previously served those customers declared Chapter 11 and did not pay its debts. As the Petition set out in full, the Commission policy and rules require procedures so that customers "experience a seamless transition of service from their original carrier to the acquiring carrier."[22] The RBOC Commenters' position directly conflicts with this policy.

Ultimately, what the RBOCs are seeking is FCC permission to use their monopoly power to (1) secure results unavailable to other bankruptcy creditors and (2) damage a commercial

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21 Verizon Comments at 18.

22 See 2000 Biennial Review -- Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket Nos. 00-257 and 94-129, *First Report and Order in CC Docket No. 00-257 and Fourth Report and Order in CC Docket No. 94-*129, 16 FCC Rcd 11218, ¶ 10 (2001). Verizon apparently would have it that the mass migration rules apply only in circumstances where customers are moved from one physical network to another. Verizon Comments at 2. This is flatly wrong.

rival. The Communications Act, however, cannot be read to enable the types of abuse of a dominant position the RBOCs are promoting.

A. Artificial Obstacles Causing a Competitor Unreasonable Costs and Delay Contradict the Competitive Mandate of the Communications Act.

A careful reading of the RBOC Commenters' arguments reveals that IDT Winstar faces only two choices as a practical matter: assume the debts of bankrupt Old Winstar or face disconnection of the circuits and facilities serving those customers wishing to transfer to IDT Winstar until such time as each ILEC chooses to reconnect them. Because the facilities and services are already in place -- they are already being used to provide service to Old Winstar's customers -- the RBOC Commenters' insistence that these facilities and services must be disconnected and then reconnected with inevitable customer disruptions is patently unreasonable, particularly where the facilities are being paid for during the transition. The RBOC Commenters provide no reason for the threatened discontinuance other than their desire to obtain the payment of Old Winstar's debts.[23] Essentially, the RBOC Commenters seek to condition entry of a new competitor on its assumption of the debts of a third party. Because there is no physical or productive reason that a disruption of service of IDT Winstar's customers must occur, the tariff provisions are unreasonable under Sections 201, 202, and 251 of the Act.

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[23] See Verizon Comments at 3 (Transfer of Old Winstar's customers to IDT Winstar without interruption of service is only available if IDT Winstar meets "a condition that IDT wishes to avoid: assumption of Winstar's debt."); SBC Comments at 1-2 (IDT Winstar should have sent notices to its customers "to notify Debtor's end user customers that IDT Winstar would terminate service if it chose not to assume [Old Winstar's] agreements."); Qwest Comments at 10 ("IDT must place a new order for service in accordance with Qwest processes and subject to standard installment intervals and facility availability . . . service provided under Old Winstar's contracts would be discontinued so as not to accrue additional charges that will not be paid or assumed."). The latter part of Qwest's statement demonstrates that Qwest's explanation is simply a pretext to excuse disconnecting service; as IDT Winstar stated in its Petition, it has undertaken in accordance with the Sale Order and Management Agreement to pay -- in advance -- for the services provided by the ILECs and other service providers during the transition period.

The Commission has recognized in analogous situations that the creation by the ILECs of artificial obstacles that impose unreasonable costs or delay the provisioning of essential facilities and services to their competitors is anticompetitive and contrary to promoting local competition under the provisions of the Act. As IDT Winstar's Petition described, the Commission prohibits ILECs from separating already-combined network elements before leasing them to a competitor.[24] As the Commission has explained, this requirement is based on the nondiscrimination requirement of Section 251(c)(3) and "is aimed at preventing incumbent LECs from 'disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants.'"[25] In upholding the prohibition, the Supreme Court reasoned that "incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice."[26] In the present case, if the ILECs were permitted to disconnect service to IDT Winstar's customers simply because IDT Winstar has not assumed Old Winstar's prior indebtedness with the ILECs, the effect would be to impair IDT Winstar's ability to compete and impose unnecessary costs without any offsetting gain in efficiency. Accordingly, the practice is unreasonable and anticompetitive and should be struck by the Commission.

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24 In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98 and 95-185, *First Report and Order*, 11 FCC Rcd. 15499, ¶ 293 (1996) ("Local Competition Order").

25 AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 395 (1999)(quoting Reply Brief for Federal Petitioners and Brief for Federal Cross - Respondents at 23).

26 Id.

The Commission's policies prohibit the imposition of unnecessary costs by dominant carriers on their competitors as being unreasonable.[27] The Commission has thus precluded the use of a metaphysical disconnect/reconnect in the context of interexchange carriers converting special access circuits to combinations of local loop and transport network elements.[28] In clarifying that carriers may use combinations of unbundled network elements to provide both local exchange and exchange access service, the FCC noted approvingly the standard local carrier practice of permitting the conversion of special access circuits to unbundled loop-transport combinations without an artificial disconnection/reconnection.[29] The FCC stated:

> Under this process, the conversion should not require the special access circuit to be disconnected and re-connected *because only the billing information or other administrative information associated with the circuit will change when a conversion is requested.* We continue to believe that [this] process will allow requesting carriers to avoid material provisioning delays and unnecessary costs to integrate unbundled loop-transport combinations into their networks, and expect that carriers will use this process for conversions.[30]

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27 See Elkhart Tel. Co., Inc. v. Southwestern Bell Tel. Co., File No. E-93-95, *Memorandum Opinion and Order*, 11 FCC Rcd. 1051, ¶¶ 35, 37 (1995) (concluding that Southwestern Bell violated Sections 201(a) and (b) of the Act for failing to provide interconnection and access to transport facilities to Elkhart based on a dispute over a compensation arrangement); Local Competition Order ¶ 315 ("[T]he terms 'just and reasonable' encompass[ ] more than the obligation to treat carriers equally . . . these terms require incumbent LECs to provide unbundled elements under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete.").

28 In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order*, 15 FCC Rcd. 1760, ¶ 5 (1999).

29 In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Supplemental Order Clarification*, 15 FCC Rcd. 9587, ¶ 30 (2000).

30 Id. (emphasis added). The Commission also stated that upon receiving a conversion request from a carrier certifying that it provides a significant amount of local exchange service, the ILEC "should immediately process the conversion" and "may not require a requesting carrier to submit to an audit prior to provisioning combinations of unbundled loop and transport network elements." Id. ¶ 31.

This process is designed to prevent ILECs from abusing the constraints on conversion of special access circuits by manipulating the fact of a "conversion" for administrative and billing purposes to impose unnecessary costs on carriers seeking to provide local services using the facilities.

Chairman Powell also has observed the fallacy of confusing actual physical changes to facilities with mere theoretical constructs. In his separate statement to the Commission's Order denying BellSouth's Section 271 application to provide long distance services in South Carolina, Chairman (then-Commissioner) Powell urged parties to "stop perpetuating [the] myth . . . that there are actually ways to take [unbundled network elements] apart, hand them to an entrant, and have that entrant put them back together like pieces in a Lego play set."[31] As he recognized, the fundamental question in such instances is one of policy, not electrical engineering.

The policy question here is indistinguishable from the Commission's prior rulings, as the ILECs are seeking to impose artificial, unnecessary costs on IDT Winstar. They have created the fiction of a disconnect/reconnect scenario before IDT Winstar's customers can receive service in order to raise a rival's costs and in the process cause serious customer disruption. The Commission should declare this practice unreasonable under Sections 201, 202, and 251 of the Act.

B. ILEC Tariffs Cannot Provide Support for Unlawful Behavior.

While avoiding any substantive discussion of the Communications Act requirements, the RBOC Commenters claim that their tariffs require the unlawful result they seek.[32] Ascribing

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31 In re Application of BellSouth Corp. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, *Memorandum Opinion and Order - Separate Statement of Commissioner Michael K. Powell*, 13 FCC Rcd. 539, 684 (1997).

32 Qwest Comments at 14-15; SBC Comments at 16; Verizon Comments at 24, 26-27. As discussed previously, the RBOCs' position has also been flatly rejected as a matter of bankruptcy law (as SBC, at least, must certainly know). In re Personal Computer Network, Inc., 85 B.R. 507, 509 (Bankr. N.D.Ill.

sacrosanct qualities to their tariffs, they insist that because the tariff provisions at hand have gone into effect, this *ipso facto* renders their actions thereunder just and reasonable. However, simply because a practice is contained in a carrier's tariff does not immunize it from legal challenge. SBC claims that acting in accordance with its own tariff "cannot possibly be a violation of the Communications Act,"[33] overlooking the Commission's authority to review effective tariffs and declare them unreasonable.[34] Indeed, as part of its most fundamental enforcement activities, the Commission has reviewed ILEC practices that were in accordance with their tariffs and where appropriate, found them to violate the Communications Act.[35] The instant matter is no different. Procedurally, IDT Winstar's Petition provides a proper vehicle for the Commission to review the relevant ILEC tariffs and, if required, to prescribe the revisions necessary for compliance with the Communications Act.[36]

1988)(noting the "inequitable consequences which would result if Bell would now be permitted to 'short circuit' the Bankruptcy Code by relying on its tariff to compel payment of its pre-petition debt or else terminate service to Plaintiffs" and stating that "Bell's attempt to hold the transfer of these numbers hostage while looking to its tariff for authority for payment of a pre-petition debt is unfounded in law and inequitable in result.").

33 SBC Comments at 16.

34 47 U.S.C. § 205; Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, *Report and Order*, 12 FCC Rcd 2170, ¶¶ 11, 18, 21 (1997)(the lawfulness of an effective rate remains subject to challenge pursuant to, *inter alia*, a tariff investigation pursuant to Section 205 and "[e]ven where the agency has made an affirmative finding of lawfulness, . . . the tariff remains subject to further review under section 205.")(citing Nader v. FCC, 520 F.2d 182, 205 (D.C. Cir. 1975)); The Associated Press, File No. TS-11-74, *Memorandum Opinion and Order*, 72 FCC 2d 760, ¶ 5 (1979)("[W]e have ongoing authority to interpret the language of tariffs that are on file with us.")("Associated Press").

35 See, e.g., Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C. Cir. 1956)(arising out of complaint filed challenging AT&T (and associated Bell Operating Company) tariff restrictions on foreign attachments); Use of the Carterfone Device in Message Toll Telephone Service, Docket Nos. 16942 and 17073, *Decision*, 13 FCC 2d 420 (1968)(investigating and striking as unreasonable AT&T tariff that prohibited interconnecting devices not supplied by the telephone company).

36 See Interconnections with Private Interstate Communications Systems, FCC 79-154, *Memorandum Opinion and Order*, 71 FCC 2d 1 (1979)(granting Aeronautical Radio's Petition for Declaratory Ruling by finding certain AT&T (and associated Bell Company) tariff restrictions unreasonable and ordering the provision of service without delay); Restrictions on the Resale and Sharing of Switched Services used for

The tariff provisions that the RBOC Commenters cite contain numerous defects; indeed it is not at all clear whether by their terms they even apply in this context.[37] The RBOCs utilize tariff language that by its terms speaks of a customer desiring to "assign or transfer the use of services": this simply reverts to the RBOCs' initial mistake that an assignment of Old Winstar's agreements has occurred. The scope of the language is therefore ambiguous. Verizon in fact concedes this ambiguity by asking the Commission to declare that "where one CLEC wishes to take over another's service arrangement with nothing more than a name change, that constitutes 'an assignment or transfer' *within the meaning of Verizon's tariffs*, so that the assignee/transferee CLEC must assume the outstanding indebtedness of the prior CLEC for such services."[38] Such a declaration would be unnecessary were the tariff provision sufficiently clear. It is well-settled that vague and ambiguous tariff provisions are construed against the carrier.[39] Moreover,

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Completion of Interstate Communications, FCC 83-40, *Memorandum Opinion and Order*, 94 FCC 2d 1110 (1983)(granting Satellite Business System's Petition for Declaratory Ruling by finding certain AT&T (and associated Bell Company) tariff restrictions to violate the Communications Act), *aff'd* Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F.2d 1492 (D.C. Cir. 1984); MTS and WATS and Market Structure, *Order*, 1985 WL 260297 (F.C.C.) (CCB 1985) (granting Republic Telcom's Emergency Petition for Declaratory Ruling and requiring ILECs to file access tariff revisions consistent with the Order); International Settlement Rates, IB Docket No. 96-261, *Report and Order on Reconsideration and Order Lifting Stay*, 14 FCC Rcd 9256, 9262 n.24 (1999)(citing United States v. Florida East Coast Railway, 410 U.S. 224, 227 (1973) and United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972))(explaining that Section 205's hearing requirement for rate prescriptions does not require the detailed oral hearing requirements of Sections 556 and 557 of the Administrative Procedure Act, but instead is satisfied by the notice and comment provisions of Section 553 of the Administrative Procedure Act, and Section 205's requirement of receiving a complaint or issuing an order of investigation on the Commission's own initiative was satisfied by the Commission's issuance of a Notice of Proposed Rulemaking); American Tel. & Tel. Co. v. FCC, 572 F.2d 17, 23 (2d Cir. 1978)(notice and comment procedures are adequate to satisfy Section 205's hearing requirement); AT&T Wide Area Telecomm. Service (WATS, Docket No. 21402, *Memorandum Opinion and Order*, 67 FCC 2d 246, ¶ 5 (1977)(Section 205 requirements can be met by a paper hearing).

37 See 47 C.F.R. § 61.2(a)("In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.").

38 Verizon Comments, at 26 (emphasis supplied).

39 Associated Press ¶ 11 (quoting Commodity News Services, Inc., 29 FCC 1208, 1213 (1960))("Tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with

Verizon's request is well beyond the scope of this proceeding and, if adopted, would stymie carrier-to-carrier transfers, and that, in turn, would make it virtually impossible for an end user to quickly find an alternative carrier in the event of a discontinuance – which, as the Commission knows too well, can already take longer than the 31 days provided for in the Commission's rules.

Additionally, if the tariff provisions were construed to apply in contexts similar to the one presented here, the Commission would have to conclude that the RBOC Commenters have already violated their own tariffs. Specifically, each carrier's tariff requires that an assignee or transferee "assume[] *all* outstanding indebtedness" as a precondition to maintaining service continuity.[40] But it is readily apparent that they did not collect "all" of the outstanding indebtedness in the two bankruptcy assignment models they present. In the WorldCom-Rhythms and AT&T/Northpoint cases, the bankruptcy orders make plain that only partial payment of the indebtedness was negotiated and agreed to by the parties to be treated as a full "cure."[41] Either the RBOC Commenters deemed their tariff provisions to be inapplicable, or they violated the tariffs' requirements. The fact of the matter is that, contrary to the their assertions, strict adherence to these provisions of the tariffs are not a prerequisite to

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the carrier's canon of construction . . . . However, if there is ambiguity in tariffs they should be construed against the framer and favorably to users . . . ."); United States. v. ICC, 198 F.2d 958, 966 (D.C. Cir. 1952)("Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier."); Komatsu v. States Steamship Co., 674 F.2d 806, 811 (9th Cir. 1982); Theodore Allen Communications, Inc. v. MCI Telecomm., File No. E-93-094, *Memorandum Opinion and Order*, 12 FCC Rcd 6623, ¶ 26 (CCB, 1997); Bell Atlantic Corp. v. Global NAPs, Inc., File No. E-99-22-R, *Order on Reconsideration*, 15 FCC Rcd 5997, ¶ 22 (2000).

40 Verizon Comments at 3, 24; Qwest Comments at 15; Qwest, Verizon, and US West FCC Tariff No. 5 at Section 2.1.2 (emphasis supplied).

41 See Qwest Comments at 14-15; SBC Comments at 11-12.

uninterrupted service. As SBC concedes, it has been willing to negotiate cures.[42] A tariff requirement with this much "elasticity" is unlawful.[43]

Further, the actual requirements for the "disconnect/reconnect" scenario are not contained in the tariff language but instead in the RBOC Commenters' internal procedures.[44] The various "options" they offer up such as CLEC-to-CLEC migration are simply not tariffed practices that have been subjected to any sort of scrutiny. On the basis of some apparent authority vested in their office manuals, the RBOCs threaten the discontinuance of telephone service for thousands of end users. Yet, it is a basic tenet that "under Section 203 of the Act, a carrier cannot lawfully enforce a term or condition unless that term or condition is specified in the tariff."[45]

Most importantly, even if all of the tariff language and "procedures" were applicable in the current context, they nonetheless are plainly illegal. As IDT Winstar has explained at length, the application of the threatened practice is not tolerated by either the Communications Act or the Commission's policies.

C. Consumer Welfare Implications Unambiguously Warrant a Grant of the Petition.

In accordance with the FCC's mandate to act in the public interest, IDT Winstar urges the Commission to consider carefully the implications of the RBOC Commenters on Old Winstar's

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42 SBC Comments at 12. See also Verizon Comments at 14 (agreed upon cure accepted in Network Plus bankruptcy); id. at 25 (cure negotiations with IDT Winstar).

43 See Applications of American Telephone and Telegraph Co. for Authorization to Construct and Operate Five Earth Stations To Provide Domestic Communications Satellite Services, File Nos. 25-DSE-P-71, et al., *Memorandum Opinion, Order and Authorization*, 42 FCC 2d 654, ¶ 19 (1973)("One of the primary purposes of tariffs is to assure that carriers will provide facilities and services without discrimination.").

44 See Qwest Comments at 14 (characterizing its tariff requirements as "procedures"); Verizon Comments at 2, 24 (claiming that IDT Winstar had not followed Verizon's procedures).

45 Public Service Enterprises of Pennsylvania, Inc. v. AT&T Corp., File No. E-93-091, *Memorandum Opinion and Order*, 10 FCC Rcd 8390, ¶ 13 (1995).

subscribers -- and the subscribers affected by other transactions. The questions here go well beyond the commercial dispute between the parties. The RBOC Commenters' efforts contain another component with more enduring effects never addressed in the their comments: an attempt to impose harm on a competitor, a strategy that in this case also involves an impairment of consumer welfare.

Of the RBOC Commenters, only Verizon even refers to the potential effects of this dispute on consumer welfare and it does so feebly, in a cursory manner, and without attention to the negative consumer welfare effects of its own proposals.[46] The plainest, most direct, and most immediate harm to consumers would result from RBOCs executing their threats to cut off service to end users. This is not only an unacceptable outcome and one wholly at odds with the most basic goal of the Communications Act, but the threat itself is unreasonable and harmful.[47] For example, in response to threats to discontinue service, the General Services Administration has informed IDT Winstar that it will not novate the contracts from Old Winstar to IDT Winstar until these proceedings are resolved. The GSA reticence is a direct result of the uncertainty that RBOCs have injected about whether they will continue to provide service.

The purpose or effect of the RBOC strategies also is to damage an efficient competitor, with an inevitable reduction in consumer welfare. This strategy is possible *only* because the ILECs possess dominant control over the underlying telecommunications network. ILECs have resisted competitive entry at every turn, litigated the Commission's implementation of the 1996 Act ferociously, and uniformly erected roadblocks and delays to competitors. In all of these efforts, they have relied upon and exploited their monopoly power to harm competitors. Now,

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46 Verizon Comments at 22.

47 See Comments of the General Services Administration (filed Apr. 29, 2002)

the RBOC Commenters continue with that effort by raising the costs of salvaging bankrupt assets and disrupting service to the remaining customers served by those assets. They cannot be permitted to employ anticompetitive strategies to such ends.[48]

Competition on the merits maximizes consumer welfare.[49] In the context of contemporary communications markets, the elimination of efficient competitors reduces welfare by reducing consumer choice and service quality, and by increasing rates.

> In addition to price discrimination, a vertically integrated firm could engage in other strategies that would have effects similar to raising directly the costs of its rivals. In particular, the integrated firm could adversely affect the timeliness or quality of the input product that it delivers to its rivals. For example, the firm may simply delay the delivery of the input product to its downstream rivals while continuing to provide the input to its own operations on a timely basis. For instance, [the dominant carrier] could speedily fulfill its own orders for . . . facilities while "slow rolling" orders by its competitors. To the extent that such delays require the rivals to incur more costs . . . those firms would be disadvantaged in the same manner as if the integrated firm simply had raised the price of the input. Similar strategies can be undertaken by degrading the quality level of the input . . . . To the extent that such strategies result in rivals setting higher prices (or reducing the quality) for their services to reflect the increased cost

48 Cavalier Telephone's problems confirm that the RBOCs' anticompetitive strategies are not limited to Winstar, but rather have been directed toward other carriers, as well. See Comments of Cavalier Telephone, LLC, at 2-3 (filed April 29, 2002) (explaining similar anticompetitive strategies effected by Verizon concerning the transition of Net2000 customers to Cavalier).

49 See Access Charge Reform, CC Docket No. 96-262, *First Report and Order*, 12 FCC Rcd 15982, ¶ 260 (1997)(explaining that the operation of competitive markets will maximize the efficient allocation of telecommunications services and promote consumer welfare); Policy and Rules Concerning the Interstate Interexchange Marketplace: Implementation of Section 254(g) of the Communications Act of 1934; CC Docket No. 96-61, *Memorandum Opinion and Order - Dissent of Commissioner Powell*, 14 FCC Rcd 391 (1998) ("History and, more importantly, Congress have judged that competition is a superior device for maximizing consumer welfare. It, generally, keeps prices at levels consumers are willing to pay, it generally promotes innovation in new products and services for consumers, and it generally promotes growth into new and, yes, even traditionally underserved markets.")(emphasis omitted).

in providing the services, they reduce the benefits available to consumers.[50]

Notwithstanding the silence from the RBOC Commenters, these reductions in consumer welfare are plainly a risk in this proceeding.

The GSA experience provides a concrete example of the potential loss in welfare that would result from allowing the RBOC Commenters to proceed with their strategies. Old Winstar is the largest holder of the federal government's Metropolitan Area Acquisition (MAA) contracts in the nation. The purpose of the MAA program was to promote local competition and thereby provide Federal Government agencies with competitive prices and new and innovative services. The threats and the resulting GSA reluctance deny the federal government and federal taxpayers the full and continuing cost savings and new technology benefits of this program. Moreover, ILECs currently provide service to the majority of federal government agencies that have not yet transitioned to MAA contracts, and the RBOC Commenters clearly benefit by keeping their federal government agency business at their higher contract rates instead of allowing the business to transition to the lower prices in the MAA contracts.

In addition to the obvious efforts to impair competition, it appears that the RBOC Commenters are seeking to make it virtually impossible for a CLEC to successfully emerge from bankruptcy unless it is purchased by an incumbent carrier. Verizon implausibly asserts that its actions and those of its incumbent brethren will not "bring about a chilling effect on future sales in CLEC bankruptcies."[51] To the contrary, it is highly unlikely that a CLEC will ever emerge from bankruptcy if the existing customer base (one of a CLEC's most valuable assets) cannot be

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50 Merger of MCI Communications Corp. and British Telecomm., GN Docket No. 96-245, *Memorandum Opinion and Order*, 12 FCC Rcd 15351 at ¶ 160 (1997).

51 Verizon Comments at 22.

served because ILECs refuse to make bottleneck facilities available to prospective buyers. The action the RBOC Commenters have taken here paves the way for either one of two possible outcomes: either a bankrupt CLEC will never find a buyer or ILEC will be the only carriers with the ability to purchase it out of bankruptcy.[52] In either case, the ILECs will have succeeded in eliminating a potential or actual competitor and stifling welfare in the process.

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52 See *Verizon Sees No Need for Major Acquisition; May Bid on Assets from Bankrupt Telcos*, Totaltele.com, April 24, 2002, at http://www.totaltele.com/view.asp?articleID=51368&pub=tt&categoryid=627 ("'We're not looking at a lot of things. But clearly there's a couple of assets out there that we want to make sure that somebody's not going to steal at a very bargain price if it's something we're going to need to replicate,' Verizon Chief Financial Officer Fred Salerno said in a telephone interview.").

IV. CONCLUSION.

The Commission should declare that any actions undertaken by the RBOCs (or other similarly situated carrier) pursuant to a disconnect and reconnect scheme with the purpose of denying or delaying the provisioning of facilities and related services to IDT Winstar and its customers would be a violation of the Communications Act.

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